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IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The City of New York (the "City") and the New York State Association of Counties ("NYSAC") submit this brief in support of petitioners in this case. Both parties have consented to the filing of all amici briefs, in accordance with their general consent letters filed with this Court.[1]

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE AMICI CURIAE

The City and NYSAC have a significant interest in the validity of 29 C.F.R. 552.109(a) -- a longstanding United States Department of Labor regulation (hereinafter the "third-party employer regulation") that applied the "companionship services" exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §213(a)(15), to employees engaged in providing companionship services and "employed by an employer or agency other than the family or household using their services."

The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home, if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

The City, the nation's largest municipality, oversees a Medicaid-funded program, which provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants. These personal care services are delivered through contracts with over 90 provider agencies throughout the City.

Pursuant to this Personal Care Services program, Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring,

walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of care to be provided to Medicaid clients is the responsibility of the City's Human Resources Administration.

Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for more significantly impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

The City requires wages and benefits that support client services. Through its recently enacted Living Wage Law, NYC Admin. Code §6-109, the City requires that the providers pay the home attendants in the Personal Care Services program a minimum wage of $9.60/hr., a wage that exceeds the state's $7.15 minimum wage. Combining the $9.60 hourly minimum wage with differentials, such as those that are paid for longevity and care provided on the weekend, the average hourly wage is over $10.50/hr. The City also requires that provider agencies provide health benefits that cover immediate family, and a modest pension. There is currently no worker shortage for the City's Personal Care Services program, and approximately 90% of the service hours provided in that program are from home attendants who have been employed by the providers for at least 2100 hours. The vast majority of clients are

served by providers with labor agreements, whose home attendants are unionized.[2]

As a result of the third-party employer regulation, prior to the Second Circuit's decision declining to enforce that regulation, the home attendants were not subject to the wage and overtime requirements of the FLSA, and the annual cost to the Medicaid program of the City's Personal Care Services program was approximately $1.6 billion dollars. The program's cost is covered 50% by the federal government, 40% by the state, and 10% by the City. The City negotiates the hourly rates for each provider prospectively and then submits them to the state for approval. Commencing in January 2006, state legislation capped localities' Medicaid expenses, and the vast majority of any increases in costs over expenditures from 2005, including any costs of complying with the FLSA, will have to be borne by the state and federal governments. See 2005 N.Y. LAWS ch. 58 §1 Part C(1)(b)-(f).

Other than the above-discussed Medicaid-funded Personal Care Services program, which is overseen by the City, there are several other Medicaid-funded programs, which provide non-institutional long term care to the City's frail elderly and disabled citizens and are jointly administered by the City and the State of New York. Of these programs, the programs that service the largest number of clients in the City are the Long Term Home Health Care program and the Managed Long Term Care

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[2] The Living Wage Law provided that the minimum wage would increase to $10/hr. as of July 1, 2006. However, this was subject to the federal and state governments maintaining their combined aggregate proportionate share of funding and approved rates, see NYC Admin. Code §6-109(b)(2), and the wage has not yet increased to $10. An increase to $10, combined with the average differential pay, would result in an average wage of over $10.90/hr.

program. The combined current caseload of these two programs is approximately 28,000 clients. Like the Personal Care Services program, the weekly service hours for these alternative programs are based primarily on the client's clinical requirements, and the programs also use home attendants. The provider agencies subcontract with Licensed Home Care Service Agencies, which employ the home attendants, who typically serve several clients per week, providing up to 60 hours of service. The Licensed Home Care Service Agencies pass their costs to the authorized providers, which are reimbursed retroactively by the state on an allowable cost basis. Like the Personal Care Services program, these programs' costs are covered 50% by the federal government, 40% by the state, and 10% by the City, and the state legislation capping localities' Medicaid expenses also applies.

NYSAC is a not-for-profit municipal corporation incorporated pursuant to the laws of the State of New York. The sole membership of NYSAC consists of the 62 counties in New York State. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, commissioners, and administrators from the 62 counties, including the 5 counties comprising the City. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the state. Outside the City, each of NYSAC's member counties provides Medicaid-funded personal care services in its respective jurisdiction throughout the state.

Affirmance of the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious ramifications for the Medicaid-funded programs administered by the City and counties, in terms of both cost and the provision of care. Therefore, the

enforceability of the third-party employer regulation is of vital importance to the City and NYSAC.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the amount of judicial deference to be accorded administrative determinations. The Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference. There is no dispute that Congress, in the companionship services exemption, expressly delegated authority to the Department of Labor to define and delimit the terms in the exemption. The third-party employer regulation was promulgated in the exercise of that authority, where: the third-party employer regulation expressly relies on the delegation of authority in the companionship services exemption; Part 552 of the regulations indicates that all of the regulations in that part were promulgated pursuant to the companionship services exemption and the Department of Labor's general authority pursuant to the FLSA to issue implementing regulations; and the third-party employer regulation was subject to the notice and comment procedures and goes beyond one case, binding all employees of third-party employers. Moreover, the Department of Labor has reaffirmed that the third-party employer regulation is a legislative rule and was not merely intended to be an advisory interpretation and that the Department considers the third-party employer regulation authoritative and legally binding. Given the above factors indicating that the regulation was promulgated by the Department of Labor in the exercise of its delegated authority, the fact that the regulation is in the subpart of Part 552 labeled "Interpretations" is irrelevant.

Applying *Chevron* deference, the third-party employer regulation should be upheld. As to Step 1 of *Chevron*, Congress did not speak directly to the issue of

whether employees employed by a third-party employer fell within the companionship services exemption, and delegated authority to the Department of Labor to define and delimit terms in the statute.

As to Step 2 of *Chevron*, the third-party employer regulation was based on a permissible construction of the statute, constituted a reasonable policy choice -- an issue more properly for legislators and administrators, not the courts -- and was not arbitrary, capricious, or manifestly contrary to the statute. The third-party employer regulation is consistent with the statutory language in the companionship services exemption and the FLSA amendments bringing domestic service employees within the coverage of the Act, where the statute does not make a distinction between employees who are employed by owners of the homes in which they are working and employees employed by third-parties.

Additionally, the third-party employer regulation is consistent with the statute's legislative history, which indicates that part of the reasoning behind the companionship services exemption was to allow those in need of such services to find assistance at a price they can afford and prevent them from unnecessarily being forced into long term care institutions. This concern applies whether the services are provided by direct hiring or through the use of an agency, such as in the Medicaid-funded programs overseen by the City and counties. The legislative history also indicates that the focus of the companionship services exemption was the nature of the employees' duties and the place where the activity was performed, not the identity of the employer.

Moreover, appropriately reading the regulations to give effect to all of the provisions, the regulations are internally consistent. In fact, construing the regulations as

the Second Circuit did, would render the regulations inconsistent with themselves.

The fact that the proposed regulation was different from the one that was ultimately promulgated is irrelevant. A proposed regulation does not represent an agency's considered interpretation of its statute, and an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, the whole idea behind the notice and comment procedure is to allow the agency to consider the proposed regulation in light of the public comments it receives. Here, the third-party employer regulation has been in force in its current form since it was promulgated over thirty years ago. Indeed, the fact that Congress has revisited the FLSA exemptions numerous times since 1974 without expressing any disapproval of the third-party employer regulation is further evidence that the third-party employer regulation is the interpretation of the companionship services exemption intended by Congress.

Finally, the complexity of the statutory regime and the expertise of the Department of Labor are further factors supporting the reasonableness of the third-party employer regulation. Thus, the third-party employer regulation should be upheld.

Affirming the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious implications for the Medicaid-funded programs administered by the City and the counties. The Second Circuit's decision is expected to tremendously increase the annual cost of the programs, and it is unclear whether additional funding will be available to cover these cost increases. If the funding is not available, the government will have to assume the burden of implementing costly new program controls, such as limiting consumer access and capping service levels.

Providers subject to the new expenses of complying with the FLSA, without the incremental funding to meet these needs, may experience cash flow difficulties and even insolvency. While the costs arguably could be limited somewhat by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client without jeopardizing the client's welfare. In the worst cases, some clients, especially those with high hour needs, might no longer be able to be serviced in the community and might have to be institutionalized.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS.

A. The Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference.

The Second Circuit's decision that the third-party employer regulation did not qualify for *Chevron* deference is erroneous and misapplied this Court's precedents regarding the deference to be accorded administrative determinations.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court upheld a regulation of the Environmental Protection

Agency, on the ground that it was a permissible construction of the Clean Air Act. This Court explained that, if Congress has not directly spoken to the precise question at issue and has delegated to an agency to elucidate a specific statutory provision, the agency's regulation, which is then considered legislative, must be given controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 842-44.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that a tariff classification in a U.S. Customs Service ruling letter regarding day planners did not qualify for *Chevron* deference. This Court explained that the *Chevron* standard applies when the statute is ambiguous, Congress has delegated authority to the agency to make rules carrying the force of law, and the agency interpretation was promulgated in the exercise of that authority. *Id.* at 226-27, 229.

This Court, in holding that the *Chevron* standard was not applicable, found that there was no indication that Congress meant to delegate authority to Customs to issue ruling letters with the force of law and that there was no indication that Customs set out with a lawmaking pretense. This Court relied on the facts that the ruling letter: was not subject to a notice and comment procedure; did not go beyond the specific case under review and did not bind third parties; was subject to modification without notice, except to those persons to whom the letter was addressed; could be issued by any of 46 different Customs offices, which issued approximately 10,000 to 15,000 such letters per year; and did not have to be published. *Id.* at 223-24, 230-34.

In this case, pursuant to the above standards, the third-party employer regulation qualified for *Chevron* deference. There is no dispute that the companionship services exemption expressly delegated authority to the

Department of Labor to promulgate legislative rules, carrying the force of law, in that it gave the Department the authority to define and delimit the terms "companionship services" and "domestic service employment." *See* 29 U.S.C. §213(a)(15); *Coke*, 376 F.3d 118, 130-31 (2d Cir. 2004) (hereinafter "*Coke I*") & *Coke*, 462 F.3d 48, 50 (2d Cir. 2006) (hereinafter "*Coke II*").

Additionally, as explained by petitioners and the Department of Labor, the third-party employer regulation was promulgated in the exercise of that authority, where, inter alia: the third-party employer regulation expressly relies on the delegation of authority in the companionship services exemption; Part 552 of the regulations indicates that the companionship services exemption, as well as the Department of Labor's general authority to issue implementing regulations under the 1974 FLSA amendments that enacted that exemption (*Pub. L. No.* 93-259 §29[b], 88 Stat. 55, 76 [1974]), were the authority for all of the regulations in that part; and the Department of Labor, in its Advisory Memorandum, has reaffirmed that the third-party employer regulation is a legislative rule and was not merely intended to be an advisory interpretation, and that the Department considers the third-party employer regulation authoritative and legally binding. *See Dept. of Labor Wage and Hour Advisory Mem. No. 2005-1* at 7 (Dec. 1, 2005) (hereinafter "*2005 Wage and Hour Advisory Mem.*"). *See also Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Auer v. Robbins*, 519 U.S. 452, 461-3 (1997) (an agency's interpretation of its own ambiguous regulations is controlling, unless plainly erroneous or inconsistent with the regulation).

Further, unlike in *Mead*, the administrative determination at issue here is a regulation, not a letter ruling, and carries the force of law, in that it: is published; was subject to the notice and comment procedures; and goes beyond one case and binds all employees of third-

party employers. Thus, the Second Circuit misconstrued *Mead* in erroneously declining to accord the third-party employer regulation *Chevron* deference. *See also* Richard J. Pierce, *Admin. L. Treatise* §6.4 at 324-25 (4th ed. 2002) (explaining that legislative rules have binding effect, are required to be promulgated pursuant to notice and comment procedures, are within the scope of rulemaking authority conferred by Congress, and impose distinct obligations on members of the public).

While the Second Circuit based its decision that the third-party employer regulation was not intended to be a legislative rule primarily on the fact that that regulation is in Subpart B of Part 552, labeled "Interpretations," *Coke I*, 376 F.3d at 131-32; *Coke II*, 462 F.3d at 50-51, the Second Circuit is mistaken in supposing that a regulation labeled an "interpretation" can never be a regulation with the force of law subject to *Chevron* deference. "Many legislative rules 'interpret' statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer." *Admin. L. Treatise* §6.4 at 326.

In fact, in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 386-90 (1999), this Court explicitly rejected the argument that the agency itself did not intend to issue a regulation subject to *Chevron* deference and only intended to bind agency employees, where the introduction to the regulation stated that the regulations that followed were "promulgated to inform the public of the constructions and *interpretations* that the United States Customs Service shall give to relevant statutory terms. . . ." (emphasis added). The introduction continued by stating that "nothing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein." This Court found that the above-cited language did not suffice to displace *Chevron* deference and emphasized that "[p]articularly in light of the fact that the

agency utilized the notice-and-comment rulemaking process before issuing the regulations, the argument that they were not intended to be entitled to judicial deference implies a sufficient departure from conventional contemporary administrative practice that we ought not to adopt it absent a different statutory structure and more express language to this effect in the regulations themselves." *Id.* at 390.

See also, Christensen v. Harris County, 529 U.S. 576, 586-88 (2000) (emphasizing that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that no *Chevron* deference was required to the interpretation of the Administrative Procedure Act by the Director of the Office of Workers' Compensation Programs, where, *inter alia*, that interpretation was not embodied in any regulation or similar binding policy pronouncement to which *Chevron* deference would apply); *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977) (a pre-*Chevron* case noting that courts are not required to give effect to interpretive regulations, but emphasizing that where Congress expressly delegated to an agency to prescribe standards or interpret statutory terms, the agency adopts regulations with legislative effect, which are entitled to review under the arbitrary and capricious standard); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 416-22 (1942) (a pre-*Chevron* case explaining that the particular label placed upon the regulation was not necessarily conclusive, for it was the substance of what the agency purported to and did do which was decisive; holding that the particular regulations -- which were characterized as an announcement of policy, but which were adopted pursuant to the agency's rule-making power and applied to all licenses -- constituted an exercise of delegated legislative power).

The third-party employer regulation -- which was issued in reliance on express delegation, was subject to notice-and-comment procedures, was published in the Code of Federal Regulations, and binds all third-party employees -- is unlike interpretations of statutes contained in formats such as internal guidance memoranda, opinion letters, and briefs, which were not the product of formal rulemaking and to which *Chevron* deference has been declined. *See, e.g., Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 487-88 (2004); *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136-37 n.9 (1997).[3]

In short, the Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference.[4]

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[3] *Chevron* deference was also denied to an Interpretive Rule of the United States Attorney General, issued without any formal procedure, on the ground that it was beyond the limited authority delegated by Congress. *Gonzalez v. Oregon*, 546 U.S. 243; 126 S.Ct. 904, 913-22 (2006). In this case, as previously mentioned, there is no dispute that there was an express delegation by Congress to the Department of Labor to promulgate legislative rules.

[4] Assuming, arguendo, that the third-party employer regulation did not qualify for *Chevron* deference, the arguments discussed *infra*, indicating that the third-party employer regulation was reasonable, would also warrant upholding the regulation pursuant to the more limited level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the agency's interpretative bulletin was entitled to some deference based on the agency's specialized experience and informed judgment; explaining that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

B. The third-party employer regulation was based on a permissible construction of the statute and should be upheld as reasonable.

Applying *Chevron* deference, the regulation should be upheld as reasonable. Applying Step 1 of *Chevron*, Congress did not speak directly to the issue of whether employees employed by a third-party employer fell within the companionship services exemption. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; 125 S. Ct. 2688, 2702 (2005). The statute is silent on the issue and delegates authority to the Department of Labor to define and delimit terms in the statute. *See* §213(a)(15). The statute does not contain definitions of the terms "companionship services" or "domestic service employment." *See* 29 U.S.C. §203, entitled "Definitions."

Applying Step 2 of *Chevron*, the third-party employer regulation was based on a permissible construction of the statute, constituted a reasonable policy choice, and was not arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-45; *Nat'l Cable & Telecommunications Ass'n*, 125 S. Ct. at 2699, 2702. This Court has explained that *Chevron* deference is grounded in the separation of powers and that policy arguments are more properly addressed to legislators or administrators, not judges, who are not experts in the field and are not part of either political branch of the government. This Court has emphasized that, while agencies are not directly accountable to the people, the

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power to persuade, if lacking power to control"). *Accord Gonzalez v. Oregon*, 126 S. Ct. at 922.

Chief Executive is, and it is entirely appropriate for this political branch of the government to make difficult policy choices. This Court has further explained that when a challenge to an agency construction of a statutory provision really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, judges have a duty to respect the legitimate policy choices of those who do have constituencies. *Chevron*, 467 U.S. at 864-66; *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 620 (1991). The agency's interpretation need not be the best or most natural one, as long as it reasonable. *Pauley*, 501 U.S. at 702.

As explained by the Department of Labor, the third-party employer regulation is consistent with the statutory language in the companionship services exemption, which does not draw a distinction between companions who are employed by owners of the homes in which they are working and companions who are instead employed by third-party employers. *See* §213(a)(15); 40 *Fed. Reg.* 7404, 7405 (1975) (finding that the exemption could be available to third-party employers since they apply to "any employee" engaged in the enumerated services and that this interpretation was more consistent with the statutory language and prior practices concerning similarly worded exemptions); *2005 Wage and Hour Advisory Mem.* at 1-2 (explaining that the phrase "any employee" indicates that the exemption applies based on the activities of the employee, not the identity of the employer).

Likewise, the third-party employer regulation is consistent with the language in FLSA sections 206(f) and 207(l), which were added pursuant to the 1974 Amendments and do not draw a distinction between domestic service employees employed by individual homeowners and domestic service employees employed by

third-party employers. *See Pub. L. No.* 93-259 §7(b), 88 *Stat.* 55, 62 (1974). Rather, those sections apply the minimum wage and overtime provisions to domestic service employees as a whole. Section 206(f) directs that minimum wage be paid both to any employee in domestic service employed in "a household" or "one or more households." *See* §206(f)(1) & (2). The reference to "one or more households" would include those employees most likely to be employed by third-party employers. Additionally, section 207(l), entitled "Employment in domestic service in one or more households," provides that no employer shall employ any employee in domestic service in "one or more households" without paying overtime. That reference, too, would apply to employees employed by third-party employers. Thus, the third-party employer regulation is also consistent with sections 206(f) and 207(l), which do not distinguish between domestic service employees employed by owners of the homes in which they are working and those employed by third-party employers.

Additionally, the third-party employer regulation is consistent with the statute's legislative history, which indicates that part of the reasoning behind the FLSA companionship services exemption was to allow those in need of such services to find assistance at a price they could afford and prevent them from unnecessarily being forced into long term care institutions. *See* 118 *Cong. Rec.* 24715 (July 20, 1972) (statement of Sen. Taft) ("Many of us may not realize that much of the domestic service in this country . . . is directed toward taking care of older people, living in their own homes, who need additional help to have the proper nutrition. . . By adding to that cost today, we are going to increase tremendously the cost of taking care of our older people, perhaps force into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes."); 119 *Cong. Rec.* 24797, 24798, 24801 (July 19, 1973) (statements of Sens.

Dominick, Johnston and Burdick). *See also Dept. of Labor Wage and Hour Div Op. Let.* WH-368; 1975 WL 40991 (Nov. 25, 1975) (indicating that, in enacting the companionship services exemption, Congress was mindful of the special problems of working families who need a person to care for an elderly invalid at home). Indeed, the Second Circuit acknowledged that, among the FLSA's purposes, were a desire to ensure that companionship services remained affordable for working families. *Coke II*, 462 F.3d at 51.

As emphasized by the District Court and the Department of Labor, whether the services are provided by direct hiring or through the use of an agency, the objective is still the same: to allow the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA. *2005 Wage and Hour Advisory Mem.* at 2; *Coke*, 267 F. Supp.2d 332, 340 (E.D.N.Y. 2003). These concerns about cost certainly apply to the Medicaid-funded programs, overseen by the City and counties. As discussed in Pt. II *infra*, given the uncertainties and delays in Medicaid funding, complying with the FLSA may lead, in the worst cases, to the outcome that some clients, especially those with high-hour needs, might no longer be able to be serviced in their homes and might have to be institutionalized. *See also McCune v. Oregon Senior Svcs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) ("We are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA"); *Olmstead v. L.C.*, 527 U.S. 581, 597-602 (1999) (holding, in the context of the Americans with Disabilities Act, that undue institutionalization, which severely diminishes the everyday life activities of individuals, qualifies as discrimination by virtue of disability).

The legislative history also indicates that the focus of the companionship services exemption was the nature of the employees' duties and the place where the activity was performed, not the identity of the employer. *See 2005 Wage and Hour Advisory Mem.* at 2 (citing committee reports which focused on the nature of the employee's activities and the place where the activity was performed). *See also Dept. of Labor Wage and Hour Div. Op. Let.* WH-368; 1975 WL 40991 (Nov. 25, 1975) (explaining that a person employed in a private household to care for someone who cannot take care of himself or herself because of age or infirmity comes within the meaning of the companionship services exemption, whether such person is employed by the household or an agency, but that services performed outside a private home would not be within the term "domestic service").

The regulations are also internally consistent. Regulations should be read to give effect, if possible, to all the provisions. *See Jay v. Boyd*, 351 U.S. 345, 359-60 (1956). Harmonizing the regulations, sections 552.3 and 552.101 can be read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. Given that the third-party employer regulation explicitly addresses third-party employment and that the issue is not directly addressed by the other regulations, it appears that the other regulations were not intended to address the issue. *See 2005 Dept. of Labor Wage and Hour Advisory Mem.* at 4-5 (explaining that the references in §§552.3 and 552.101 to domestic service employment needing to be performed in the home of the employer were vestiges of the language's origin in the Social Security regulations; and citing the legislative history behind these regulations, which focused on the importance of the work being performed in a private home to qualify as "domestic service employment").

Further, as explained by the Department of Labor, construing sections 552.3 and 552.101(a) of the regulations as addressing the issue of third-party employment would render the regulations inconsistent with themselves. Aside from making §552.109(a) superfluous and contradictory, such a reading would be inconsistent with §552.101(a)'s inclusion of "private household workers" within the definition of "domestic service employment." As explained by the Department of Labor, the term "private household workers" has long been understood by both Congress and the Department to include the employees of third-party employers. *See* 119 *Cong. Rec.* 24796 (July 19, 1973) (statement of Sen. Dominick, quoting the Department's definition of the term "private household workers" as including employees working in a private residence and employed by a household service business); *2005 Wage and Hour Advisory Mem.* at 6 (discussing legislative history of term "private household workers").

While the Second Circuit relied on the fact that the Department of Labor's position has been inconsistent over time, in declining to give deference to the third-party employer regulation (*see Coke II*, 462 F.3d at 52; *Coke I*, 376 F.3d at 134), the fact that the proposed regulation was different from the one that was ultimately promulgated is irrelevant. "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (rejecting the Court of Appeals' reasoning that deference was not due to the agency's interpretation of the statute because there was an inconsistency between the proposed rule and the final promulgated regulation). *See also Yellow Transp., Inc. v. Michigan*, 537 U.S. 36-39, 41, 45-48 (2002) (according *Chevron* deference to Interstate Commerce Commission regulations, which were issued pursuant to an

express delegation by Congress, after notice and comment proceedings, and differed from the regulations originally proposed). Indeed, the idea behind the notice and comment procedure is to allow the agency to consider the proposed regulation in light of the public comments it receives.

Moreover, even if the regulation had changed since it was promulgated, *Chevron* emphasized that an agency to engage in informed rule-making, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 857-58, 863-64 (1984) (upholding the regulation as permissible, notwithstanding that the regulation was different than the one previously promulgated on the same subject). *See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; 125 S. Ct. 2688, 2699-2700 (2005) (rejecting the argument that the interpretation did not qualify for *Chevron* deference on the ground that the agency's interpretation was inconsistent with past practice; emphasizing that the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency).

In this case, the third-party employer regulation has been in force in its current form since it was promulgated over thirty years ago. Deference is especially warranted to longstanding administrative constructions, where Congress has revisited the statute and has not seen fit to revise or repeal the agency's interpretation. In those circumstances, there is persuasive evidence that the agency interpretation is the one intended by Congress. *Commodity Futures Trading Comm'n*, 478 U.S. at 845-46. *Accord Edelman v. Lynchburg College*, 535 U.S. 106, 117-18 (2002); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). In this case, as recognized by the Second Circuit, Congress revisited section 213 of the FLSA, by amending it seven times since 1974, without expressing

any disapproval of the third-party employer regulation. *See Coke I*, 376 F.3d at 130. Thus, the third-party employer regulation's long existence, without change by Congress, is a further factor supporting reasonableness of the regulation.

Finally, the complexity of the regulatory scheme, and the expertise of the Department of Labor are additional factors supporting the reasonableness of the third-party employer regulation. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 217-22, 224-25 (2002) (explaining that *Chevron* was the appropriate standard, given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 125 S.Ct. 2688, 2712 (2005) (explaining that the agency was in a far better position than the Court to address the questions at issue, which involved a subject matter that was technical, complex, and dynamic); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

In short, the Second Circuit erred and misapplied this Court's precedents when it declined to accord *Chevron* deference to the Department of Labor's third-party employer regulation. In order to avoid repetition, the amici curiae adopt the other arguments made by petitioners in support of a reversal of the Second Circuit's decision.

II. AFFIRMING THE SECOND CIRCUIT'S DECISION WILL HAVE SERIOUS IMPLICATIONS FOR THE MEDICAID-FUNDED PROGRAMS ADMINISTERED BY THE CITY AND THE COUNTIES.

Affirming the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious implications for the Medicaid-funded programs administered by the City and the counties in New York state, in terms of both cost and the provision of care.

A. Financial Implications for the Government of the Circuit's Decision

As to the City's Personal Care Services program alone, the Second Circuit's decision is estimated to increase the annual cost of the program and required Medicaid funding by approximately $250-280 million annually.

The estimated additional annual cost consists primarily of: (1) $73 million overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (2) an increase of $168 million in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants, because non-paid "sleep-in" hours would be limited to 8 hours daily under the FLSA, see 29 C.F.R. 785.22, whereas under the City's current program, non-paid "sleep-in" hours consist of 12 hours daily, with a paid sleep-in shift differential; and (3) $14 million in travel time, which will now have to be paid to attendants who serve more than one client and travel between cases, see 29 C.F.R. 785.38.

Similarly, as to the other Medicaid-funded programs administered jointly by the City and State, or by the counties, while cost projections are not currently

available, compliance with the Second Circuit's decision will significantly increase the costs of these programs.

In short, the economic impact of complying with the Second Circuit's decision and continuing to provide services to clients currently receiving long term care services -- approximately 80,000 in the City alone -- is tremendous. The government will either have to pay for the increased costs of complying with the FLSA or assume the burden of implementing costly new program controls, such as limiting consumer access and capping service levels.

B. Implications for the Providers

It is unclear whether the additional funding to cover the increased costs will be available. There have been longstanding continuing concerns across government about Medicaid costs spiraling out of control. *See, e.g.*, 151 *Cong. Rec. S.* 14073, 14116-18 (Dec. 20, 2005); 152 *Cong. Rec. S.* 723, 723 (Feb. 6, 2006) (statements of Senator Grassley on Deficit Reduction Act of 2005, emphasizing that "three entitlement programs -- Social Security, Medicare, and Medicaid -- as a percentage of the gross domestic product are going to continue to grow and grow and grow until reaching a point where it squeezes out almost everything else in the Federal Budget" and that steps to reform Medicaid were based on a unanimous agreement of the 50 governors); *Nat'l Governors Ass'n, Policy Position "EC-16 Medicaid Reform Policy"* (July 20, 2005) ("Medicaid spending, however, has increased dramatically over the last five years driven by a 40 percent increase in caseload and a 4.5 percent per year increase in the health care price index, strengthening the impetus for reform"); *Administration's 1994 Health Budget: Hearing Before the Senate Finance Committee*, 103rd Cong. 1st Sess. 78 (Apr. 1, 1993) (prepared statement of Donna E. Shalala, HHS Secretary, indicating that the Medicaid reforms in the Omnibus

Budget Reconciliation Act of 1993, *Pub. L. No.* 103-66, 107 *Stat.* 312, were part of a package intended to confront "[t]he daunting task of cost containment" necessitated by rapidly increasing health care expenditures).

As to the City's Personal Care Services program, if the City's request to the State for increased rates is not approved and additional funding is not appropriated by the State in its budget, the providers will have no funding source to pay the additional costs to comply with the FLSA. Moreover, even if the funding is approved by the State, there likely would be a significant time lag from submission of the request to approval.

Many Personal Care Services program providers subject to the new expenses of complying with the FLSA, without the incremental funding to meet these needs, will experience cash flow difficulties. Many City providers are community based not-for-profit organizations that are funded at cost and operate with limited cash flow, without the backing of a parent organization with significant resources. Providers might find it necessary to increase their workforce to minimize each home attendant's hours in excess of 40 hours per week and, thereby, avoid overtime payment. Providers will then incur additional administrative costs associated with the hiring and maintenance of this increased workforce. In addition, providers will need to increase their nurse (RN) staffing levels in order to provide more supervisory visits on the cases as needed to ensure that each home attendant is assessed. Nurses are both hard to hire and costly. Also, more complex scheduling will result in the need for additional case coordinators. Further, some providers might need to ask the City to reduce their client caseload and might not be able to accept new cases, especially high-hour cases. Finally, some providers might find it difficult to meet payroll and become insolvent. Thus, the

implications for providers include cash-flow difficulties and potential insolvency.

C. Implications for Clients and Their Families

The above-discussed potential provider insolvency and efforts to reduce costs, such as limiting consumer access, capping service levels, and limiting each home attendant to 40 hours per week to avoid overtime, will have unfortunate impacts on individual clients. In the worst case, some clients, especially those with high-hour needs, might no longer be able to be serviced in the community and might have to be institutionalized.

Some clients with high-hour needs would be served by multiple home attendants. There are substantive reasons, however, why limiting each home attendant to 40 hours and providing multiple home attendants to clients is not readily doable. The relationship between a home attendant and client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below.

1. Privacy in the Home

Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the

home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

2. Continuity of Care

Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable

about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

3. Family Compatibility

In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can be difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client. Further, if providers find it necessary to contain costs by introducing additional home attendants to the home, and if the client or client's family is unwilling to allow multiple attendants in the home, the ability to provide a safe plan of care may be compromised. In such circumstance, the final outcome may be that the client is transferred to a nursing home.

In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, limit the ability to provide multiple attendants for each client, in order to keep overtime costs down. Introducing multiple home attendants can create undue stress for clients and adversely impact their quality of life.

D. Implications for the Workforce

If home attendants are limited to working 40 hours per week to avoid overtime costs, many current longstanding home attendants who now work more than 40 hours weekly will see a reduction in their assigned hours and real wages. For example, a home attendant with the average hourly wage in the Personal Care Services Program, whose scheduled weekly hours are reduced from 50 to 40 weekly, will experience reduced annual earnings of about $5,460 or 20%. Home attendants facing such reduction in real wages might seek opportunities in other industries, putting the City's success in employee retention and client service at risk.

It is much simpler for home attendants to work for a single provider, rather than having to find employment with two or three different provider agencies so that their time with each provider does not exceed 40 hours per week.

In short, affirming the Second Circuit's decision will have serious implications in terms of both cost and the provision of care for the Medicaid-funded programs administered by the City and the counties in New York State.

CONCLUSION

THE SECOND CIRCUIT'S JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

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